



IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

KOREAN AIR LINES CO., LTD.,

Cross-Petitioner,

—v.—

MARJORIE ZICHERMAN, individually and as executrix
of the estate of Muriel A.M.S. Kole, and Muriel Mahalek,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF CROSS-PETITIONER

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The Brief in Opposition to the Cross-Petition evidences a basic misunderstanding by Cross-Respondents of the importance of the Question Presented for Review, the conflicts created by the decision of the court below with the decisions of the Court and other Circuit Courts, and the compelling necessity for the Court to review the decision of the court below at this time, so as to settle the law for pending and future cases in which the same question is presented and will arise.

Contrary to Cross-Respondents' argument (Brief in Opposition at 2), there is a "legal void" created by the Warsaw Convention.¹ The Warsaw Convention is silent on the types of

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934), reprinted in note following 49 U.S.C. App. § 1502.

compensatory damages recoverable in a death action governed by the Convention and expressly directs the courts to the national law of, in this case, the United States, to fill this "legal void." See Warsaw Convention, Article 24, 49 Stat. 3020 (reproduced in the Appendix to the Cross-Petition at CA5); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1485-88 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) ("Korean Air II").

The applicable national law of the United States is the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.* ("DOHSA"), since the death of the decedent occurred on the high seas within the meaning of DOHSA. The Court has held that DOHSA does not permit the recovery of nonpecuniary damages for loss of society by anyone, whether dependent on the decedent at the time of death or not. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27-33 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 215-19, 233 (1986); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622-25 (1978).

Cross-Respondents' argument that a judicial desire for uniformity in recoverable damages in Warsaw Convention cases, whether the passenger death occurs on the land or on the sea, can override the clear congressional directive in DOHSA, has been rejected by the Court. *Tallentire*, 477 U.S. at 232-33; *Higginbotham*, 436 U.S. at 624. If uniformity is to be desired in a federal common law of damages applicable to Warsaw Convention cases, then the law should be fashioned from the Acts of Congress, such as DOHSA, the Jones Act, 46 U.S.C. § 688 *et seq.* and Federal Employers' Liability Act, 45 U.S.C. § 59 *et seq.*, each of which limits recoverable damages to pecuniary losses only. See *Miles*, 498 U.S. at 27-33; *Higginbotham*, 436 U.S. at 624; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405-08 (1970); *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 415, 415 n.27 (9th Cir. 1983).²

² Cross-Respondents' argument that it is unfair to apply DOHSA in a Warsaw Convention case because of the limit of liability contained in Article 22 of the Convention is unfounded. The Article 22 limit of liability is irrelevant to the question of what "types" of compensatory dam-

None of the authorities cited by Cross-Respondent (Brief in Opposition at 2-3), supports or justifies the wholesale rejection of DOHSA. The decision in *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 37 F.3d 804, 828-29 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) ("*Lockerbie II*"), a non-DOHSA case, adopted general maritime law as the best source of federal common law, but incorrectly concluded that *Gaudet*³ was representative of general maritime law. *Bowden v. Korean Air Lines*, 814 F. Supp. 592, 597-98 (E.D. Mich. 1993), *appeal argued*, Nos. 93-2144 *et seq.* (6th Cir. 1995), misinterpreted the Convention and held that loss of society damages are allowed on the basis of the Convention alone, without reference to any domestic law. *Bowden* currently is pending on appeal and was argued on January 31, 1995. The courts in *In re Inflight Explosion of TWA Aircraft Approaching Athens, Greece on Apr. 2, 1986 (Ospina)*, 778 F. Supp. 625 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1944 (1993) and *In re Korean Air Lines Disaster of Sept. 1, 1983*, 704 F. Supp. 1135 (D.D.C. 1988), *did not* discuss what types of "wrongful death" damages are recoverable in a DOHSA/Warsaw Convention case. Finally, the court in *In re Air Crash Disaster Near Honolulu, Hawaii on Feb. 24, 1989*, 792 F. Supp. 1541 (N.D. Cal. 1990) ("*Hawaii I*"), *did not* address the recovery of wrongful death damages. However, in a subsequent decision, not cited by Cross-Respondents, the same court *did* address the types of recoverable damages available under the Warsaw Convention for a death on the high seas and specifically held that the *wrongful death* measure of damages in aviation accidents over the high seas "are governed by DOHSA, as DOHSA is the directly applicable 'wrongful death' statute

ages are allowed by the domestic law of the United States for a death on the high seas.

³ *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). Even if *Gaudet* retains any vitality in light of *Miles*, a matter which has been questioned by several Circuit Courts (*see* Cross-Petition at 13-14), the principles of *Gaudet* do not have application to any death occurring on the high seas. *Higginbotham*, 436 U.S. at 623-25.

in this case." *In re Air Crash Disaster Near Honolulu, Hawaii* on Feb. 24, 1989, 783 F. Supp. 1261, 1265 (N.D. Cal. 1992) ("*Hawaii II*").

Contrary to Cross-Respondents' argument, there is no "majority rule" in Warsaw Convention cases allowing loss of society damages. There is, however, an "absolute rule" established by the federal wrongful death statutes enacted by Congress and the general maritime law developed by the Court, that nonpecuniary damages for loss of society are not recoverable for any death on the high seas.

CONCLUSION

The Cross-Petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

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